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No. 88-1897

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MICHIGAN DEPARTMENT OF STATE POLICE
and COL. R. T. DAVIS, Director of the
Michigan Department of State Police,
Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW and JACK WELBORN,
Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AND VIRGINIA COALITION AGAINST DRUNK DRIVING AS *AMICI CURIAE*

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Pursuant to Rule 36.3 of the rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the refusal of respondents' counsel to provide consent.

The Washington Legal Foundation (WLF) is a national non-profit law and policy center with more than 120,000 members and supporters nationwide. WLF engages in litigation and participates in the administrative

process in a variety of areas and devotes a substantial amount of its resources to promoting victims' rights and criminal justice reform.

Over the last 10 years, WLF has appeared as *amicus curiae* in numerous cases before this Court and lower federal courts that relate to the issue before the Court in the instant case. *See, e.g., National Treasury Employees Union v. Von Raab*, —— U.S. ——, 109 S. Ct. 1384 (1989). In addition, WLF participated as a member of the Surgeon General's Workshop on Drunk Driving as a member of the Judicial and Administrative Processes panel. *See* U.S. Dep't of Health and Human Services, *Surgeon General's Workshop on Drunk Driving: Proceedings* (Dec. 14-16, 1988).

The Virginia Coalition Against Drunk Driving (VCADD) is a coalition of civic action groups concerned with the continuing threat to public safety caused by alcohol-impaired drivers. The organizations and groups that make up VCADD include Virginians Opposing Drunk Driving (VODD), with some nine chapters throughout the Commonwealth; the various local chapters of Mothers Against Drunk Driving (MADD); the American Automobile Association of Virginia; and numerous county and regional task forces against alcohol and drug abuse.

In recent years, VCADD and its members have repeatedly urged the Virginia legislature to enact meaningful drunk-driving laws and provide state and local law enforcement officials with the necessary tools to enforce those laws. Although much remains to be done, great strides have been made in raising the public awareness of the death and destruction caused by drunk drivers. One of the most important tools in this battle has been the widespread use of sobriety checkpoints in high risk areas. If the decision of the Michigan court is affirmed, VCADD (and the citizens of Virginia) will be adversely affected by the loss of one of the most effective tools for raising public awareness of the battle against drunk driving. Accordingly, the *amicus* has a strong interest in the outcome of this case.

For the foregoing reasons, *amici curiae* respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae*. *Amici* are in a unique position to aid the Court in its consideration of the issues presented. The interests of *amici* are direct and substantial. The participation of the *amici* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear.

Accordingly, *amici* respectfully request that their motion for leave to file an *amici curiae* brief in support of petitioner be granted.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

1. Over the past ten years, one-quarter of a million Americans have lost their lives in alcohol-related automobile crashes. These deaths were avoidable. Sobriety checkpoints are an important component of programs that have reduced the incidence of drunk driving and resulting loss of life. Programs that include checkpoints pre-

vent drunk driving more effectively than reliance on other law enforcement techniques, such as waiting to observe erratic driving behavior.

2. Sobriety checkpoints are valid under the Fourth Amendment as reasonable conditions of access to the publicly-funded highway system. Such checkpoints have a close nexus to the safe use of highways and thus should be analyzed in a different manner than searches or seizures undertaken for general law enforcement purposes. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 560 n. 14 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 n.8 (1975). Checkpoints do not involve the sort of unconstrained police discretion that this Court found objectionable in *Delaware v. Prouse*, 440 U.S. 648 (1979). The validity of sobriety checkpoints can also be sustained under the administrative search doctrine. *New York v. Burger*, 482 U.S. 691 (1987).

3. Even under the balancing test that this Court would apply to checkpoints for general law enforcement purposes, the program in question should be upheld. The burden on motorists is minimal, and sobriety checkpoints serve a substantial public interest in preventing drunk driving and the attendant loss of life. It is not legally required that checkpoints be the least intrusive or most efficient means of achieving this objective. *Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402, 1419 n. 9 (1989). The Michigan Court of Appeals was also wrong to speculate about the "subjective intrusion" of such checkpoints in causing undue "fear and surprise" among motorists.

4. Once it is determined that sobriety checkpoints are reasonable techniques for promoting highway safety, there should be no continuing role for judicial supervision of the details of operating these programs. Some courts have held that the Fourth Amendment requires them to conduct in each case a painstaking review of numerous factors pertaining to checkpoint operation. *See, e.g., State v. Deskins*, 234 Kan. 529, 673 P.2d 1174, 1185 (1983). This sort of judicial intrusion into the details of checkpoint management places courts in a role for which they are not suited and discourages the proper use of checkpoints by inviting continual and burdensome litigation.

ARGUMENT

I. SOBRIETY CHECKPOINTS ARE A NECESSARY WEAPON IN THE WAR AGAINST DRUNK DRIVING

A. One of the Most Serious Problems Facing the American Public Is Drunk Driving

Drunken driving in America has fostered a national tragedy in which well over 20,000 people per year die needlessly in alcohol-related automobile accidents, and hundreds of thousands more are seriously injured.[1] In 1984, the Presidential Commission on Drunk Driving summarized the scope of the problem as follows:

> At least 50 percent of all highway deaths involve the irresponsible use of alcohol. Over the past 10 years, 250,000 Americans have tragically lost their lives in alcohol-related crashes. Conservative estimates place the annual economic loss at $21 billion, while others run as high as $24 billion. There is, of course, no way to measure the loss of human lives.
>
> In single vehicle fatal crashes, for which fault can be more easily ascertained than in multiple vehicle crashes, upwards of 65 percent of those drivers who died were legally under the influence, *i.e.*, their alcohol level was above 0.10.[2]

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[1] *See* National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving*, at 5 (Dec. 1987).

[2] Presidential Commission on Drunk Driving, *Final Report*, at 1 (Nov. 1983).

Indeed, the actual impact of drunk driving may even be greater than that reported by the Presidential Commission. In this regard it has been noted that:

The problem of drunken driving has not escaped notice by this Court.[3] Indeed, even the Michigan trial court, in the course of striking the Michigan sobriety checkpoint law, held that the state's interest in controlling drunken driving was so clear as to require little analysis.[4]

These figures underestimate the extent of the problem. They are based solely on crashes reported to the police. The National Highway Traffic Safety Administration (NHTSA) estimates that there are twice as many unreported crashes as there are crashes reported. The figures include only those traffic crashes in which there were injuries or fatalities; there are no available estimates of property damage from alcohol-related collisions. Furthermore, many drivers in fatal crashes are simply never tested for [blood alcohol levels]. NHTSA estimates that only 42 percent of all drivers in fatal motor vehicle collisions, 63 percent of fatally injured drivers, and 23 percent of surviving drivers are tested, and that only 80 percent of the test results are ever actually reported.

Jernigan & Mosher, *Preventing Alcohol-Related Motor Vehicle Crashes: A Policy Agenda for the Nation*, 14 Contemp. Drug Probs. 243, 245 (1987) (footnotes omitted).

[3] In *South Dakota v. Neville*, 459 U.S. 553, 558-59 (1983), the Court stated:

> The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that state courts have, has repeatedly lamented the tragedy. See *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez v. Campbell*, 402 U.S. 637, 657, 672 (1971) (Blackmun, J., concurring) (footnote omitted) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); *Mackey v. Montrym*, 443 U.S. 1, 17-19 (1979) (recognizing the "compelling interest in highway safety").

[4] Petition for Writ of Certiorari to the Michigan Court of Appeals, Appendix, at 72a-74a, *Michigan Dep't of State Police v. Sitz*, No. 88-1897 (U.S. filed May 22, 1989) (hereinafter "Pet. App.").

This is, of course, true. But care must be taken that, in conceding the theoretical importance of combating drunk driving, and then moving on, we do not pass over too lightly, or perhaps ignore, the very personal horrors caused by drunk drivers on our nation's highways.

While some opponents of sobriety checkpoints prefer to characterize alcohol-related crashes as "accidents,"[5] that terminology is misleading. Deaths and injuries resulting from drunken driving "are preventable and are not the result of 'accidents' . . . ."[6] They are tragedies that need not and should not occur.

To come close to understanding the devastation that results when a preventable loss of life takes place at the hands of a drunken driver, a painful step beyond statistics and "conceding" the problem is required. The *Journal of the American Bar Association* described the May 14, 1988 crash, in which a drunk driver proceeding the wrong way on a dual lane highway hit a school bus containing 63 teenagers and four adults returning from a church-sponsored outing, as follows:

> The fuel tank of the bus ruptured and exploded in an orange fireball that shot from the front to the back of the bus. Flames engulfed the bus—"Not one part of it was untouched," Carroll County Coroner James Dunn told reporters, "inside, outside."
>
> Twenty-four teenagers and three adults died when they could not reach the rear exit. Their bodies were burned beyond recognition. Dental records were used because, as Kentucky State Medical Examiner Dr.

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[5] *See, e.g.*, Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. Davis L. Rev. 595, 635 (1985) (footnotes omitted) (emphasis supplied) (contending that "only a small percentage of drivers are drunk at any given time and place, and only a small subset of these drunk drivers are involved in *accidents* causing death or injuries").

[6] *Jernigan & Mosher*, *supra* note 2, at 244.

George Nichols told family members, he did not want the families to see the charred remains.

"The picture . . . of their children in that room," he explained to reporters later, "is not what they have in their memories or wallets."[7]

It is in this context which the sobriety checkpoint procedures of Michigan and of other states must be judged. As shown in the next section of this brief, sobriety checkpoints time and again have proven themselves to be an invaluable and minimally intrusive component of comprehensive prevention strategies aimed at minimizing the occurrence of alcohol-related automobile tragedies.

B. Sobriety Checkpoints Have Proven Their Worth In the War Against Drunk Driving

If there is one thing that is agreed among social scientists in the vanguard of the battle against drunken driving it is that there is no one solution to the problem. Rather, minimizing the presence of drunk drivers on America's highways requires a systemic approach.[8] But it is also virtually uniformly agreed that sobriety checkpoints have been an important component of programs that have achieved measurable success in keeping drunk drivers off of the road.[9]

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[7] McAllister, *The Drunken Driving Crackdown: Is it Working?*, 74 A.B.A. J. 52, 54 (Sept. 1988).

[8] *See Final Report*, *supra* note 2, at 1; *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving*, *supra* note 1, at 9. *Jernigan & Mosher*, *supra* note 2, at 244.

[9] Most recently, the Department of Transportation has reviewed studies aimed at measuring the deterrent effect of sobriety checkpoints and has concluded that recent studies document "15-30 percent reductions in alcohol-related fatal crashes . . . ." Alcohol Abuse Prevention Program for the Transportation Industry, 54 Fed. Reg. 46,326, 46,335 (Nov. 2, 1989) (advance notice of proposed rulemaking). Critics of sobriety checkpoints, such as *Jacobs & Strossen*, *supra* note 5, at 640, who state that "it has not been convincingly demonstrated that drunk driving roadblocks have reduced drunk driving in any jurisdiction" are therefore plainly and simply wrong. Sobriety checkpoints have been a part of virtually every program that has made inroads against drunk driving. *See, e.g.*, Voas, Rhodenizer & Lynn, *Evaluation of Charlottesville Checkpoint Operations*, U.S. Dep't of Transp. Final Report, DOT HS 806 989, at 48 (May 1985) ("The number of alcohol-related accidents in Charlottesville was 8 to 15% lower during the year of checkpoint operations than in the previous three years"); *id.* at i ("A 13% reduction in alcohol-related accidents provided evidence that the checkpoint program was effective in reducing accidents due to impaired driving"); Levy, *Methodologies for the Evaluation of Local Traffic Safety Programs With an Application to New Jersey DWI Programs*, 11 Evaluation & Program Plan. 255, 264 (1988) (noting that the success of the "strike force" aspect of the New Jersey program, including predominantly sobriety checkpoints, has been significant and long lasting). *See also* Homel, Carseldine & Kearns, *Drink-Driving Countermeasures in Australia*, 4 Alcohol, Drugs & Driving 113 (1988) (noting that following the implementation of sobriety checkpoints in New South Wales, Australia, alcohol-related fatal crashes fell by approximately 36% and have remained at that level for over four years); Ross, *Britain's Christmas Crusade Against Drinking and Driving*, 48 J. Studies On Alcohol 476 (1987) (sobriety checkpoints used successfully to curb drunk driving during the Christmas season in the United Kingdom).

The particular value of sobriety checkpoints is their ability to help bring about general deterrence. In its latest progress report the Presidential Commission on Drunk Driving described this general deterrence goal as follows:

> [T]he object [of employing checkpoints] has not been to stop and arrest great numbers of possible offenders, rather, it has been to preclude drunk and impaired drivers from getting on the road, realizing they might not avoid detection at established checkpoints.[10]

This preeminent goal of sobriety checkpoints was inexplicably downplayed by both the trial court and the Mich-

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[10] *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving*, *supra* note 1, at 10.

igan Court of Appeals, each of which purported to judge the effectiveness of Michigan's sobriety checkpoint program by looking to the number of drunk drivers apprehended at checkpoints. The fallacy of such an approach is succinctly put in H. Laurence Ross' study of the United Kingdom's "Christmas Crusade" against drunk driving, quoting the assistant chief constable for Derbyshire: "In traffic statistics, the more you catch, the more you have failed. The success rate is how many fewer we catch among the drivers tested. . . . We try to test as many people as possible, knowing they will be negative." [11]

The goal of sobriety checkpoints, then, is to raise the driving public's perception of the possibility of arrest when one drives under the influence of alcohol.[12] Sobriety checkpoints reinforce the message that our government takes drunk driving seriously by serving as a visible warning to both drunk drivers and sober drivers who might contemplate driving in an impaired state on some other occasion. Accomplishing this goal of heightened perception may have little or nothing to do with the actual

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[11] *Ross, supra* note 9, at 478. The fallacious approach of attempting to equate arrests with effectiveness is also common among those commentators opposing continued use of sobriety checkpoints. *See, e.g., Jacobs & Strossen, supra* note 5, at 638 (contending that sobriety checkpoints lack efficacy because they tend to "produce very few drunk driving arrests").

[12] The critical role of raised public perception in any program seeking to achieve general deterrence of alcohol-related traffic injuries has recently been described by the Department of Transportation as follows:

> [I]f motor vehicle DWI offenders are not arrested, no sanctions can be imposed and no deterrence can occur. However, even if there is an increase in enforcement, this does not ensure that deterrence will result, since the public may not be sufficiently aware of such efforts.

Alcohol Abuse Prevention Program for the Transportation Industry, *supra* note 9, at 46,335.

number of drunk drivers apprehended at a particular checkpoint.[13] Thus, it has been noted that:

> The efficacy of measures such as DWI roadblocks, . . . is less dependent upon increasing the *actual* likelihood that a drinking driver will be apprehended and punished than upon affecting the public *perception* of such risks. If people are discouraged from drinking and driving because of the perceived threat of being ensnared in a sobriety checkpoint, it matters little that DWI arrests are not appreciably affected.[14]

Moreover, heightened public perception cannot (as the Michigan trial court and some commentators have suggested) be as effectively achieved through the use of more

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[13] While general deterrence can be achieved even where significant numbers of drunk drivers are not arrested at sobriety checkpoints, it still should be borne in mind that drivers who *are* apprehended at checkpoints are dangerous and may have eluded detection if conventional detection methods were utilized. As noted in 4 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 10.8(d), at 72-73 (2d ed. 1987) (footnotes omitted):

> [E]ven if a patrolling officer is fortunate enough to be in the vicinity where a drunk driver is operating his vehicle, it does not necessarily follow that the driver will at that particular time drive his car in such a fashion as to create a reasonable suspicion justifying a stop. And the chances of such observation in the first place are rather slight, given the substantial number of intoxicated drivers on the roads.

See also People v. Bartley, 109 Ill. 2d 273, 287, 486 N.E.2d 880, 886 (1985), *cert. denied*, 475 U.S. 1068 (1986).

> [T]he ability of a drunk driver to avoid erratic movements along a roadway does not mean he will be able to respond to an emergency where prompt reflexes may be of great importance. . . . [T]he carnage caused by drinking and then driving is so serious it warrants resort to both types of apprehension—stopping automobiles which are being driven erratically and roadblocks to detect drunken drivers before they drive in an erratic manner.

[14] Acker, *Social Sciences and the Criminal Law: A Report on America's War Against Drunk Driving*, 25 Crim. L. Bull. 376, 385 (1989).

conventional law enforcement devices such as roving patrols on the lookout for erratic driving behavior.[15] This fact is strikingly shown in a study by Drs. Williams and Lund comparing public perception of enforcement of drunk driving laws in Fairfax, Virginia, and Montgomery County, Maryland.[16] The study demonstrated that while Fairfax, which did not use sobriety checkpoints, historically expended significant resources to enforce laws against driving while intoxicated, the perception of the public *in both jurisdictions* was that a drunken driver was more likely to be apprehended in Montgomery County, which historically spent less on enforcement of drunk driving laws but which did use the highly visible countermeasure of sobriety checkpoints.[17]

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[15] *See, e.g., Jacobs & Strossen, supra* note 5, at 645 (contending that drunk driving can be policed more effectively by "roving patrols" watching for "erratic driving behavior."). As previously noted, *supra* note 13, such is not always the case.

[16] Williams & Lund, *Deterrent Effects of Checkpoints on Drinking and Driving*, 3 Traffic Safety Evaluation Research Rev. 7 (1984). *See also* the discussion of the Williams & Lund study set forth in Alcohol Abuse Prevention Program for the Transportation Industry, *supra* note 9, at 46,335.

[17] *Williams & Lund, supra* note 16, at 17. Similar results were reported by Drs. Williams and Lund in a comparison of Kent and Sussex Counties in Delaware (where sobriety checkpoints were used) and several Maryland Eastern Shore counties where checkpoints were not used. *Id.* at 14-15. *See also Acker*, supra note 14, at 384 (emphasis in original):

> For obvious reasons, it is preferable to pursue strategies designed to *prevent* drinking and driving instead of those simply aimed at apprehending drunk drivers. Under classical deterrence theory, preventive measures are most likely to succeed when potential offenders believe that the costs of engaging in illegal conduct outweigh the benefits of doing so. Such costs become increasingly significant as the perceived *certainty* of apprehension and punishment is enhanced and as the perceived *severity* and *celerity* of punishment are increased.

Clearly sobriety checkpoints have proven their value in the war against drunk driving. The National Commission on Drunk Driving reported in 1986 that sobriety checkpoints were being utilized against drunk driving in all but two states.[18] Of the 19 countermeasures monitored by the Commission in that year only one measured greater acceptance across the nation.[19] At the federal level, the use of sobriety checkpoints is one of the prerequisites for obtaining Alcohol Traffic Safety Incentive Grant Funds.[20] And most importantly, it is now becoming evident that programs incorporating sobriety checkpoints are having significant effect in terms of reducing the menace of drunken drivers on our nation's highways. Sobriety checkpoints are highly useful to target particular times of the day when drunk drivers are more likely to be on the road[21] or in targeting times of the year when drunken

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[18] Those states were Pennsylvania and Utah. National Commission Against Drunk Driving, *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving*, at 2-3 (Dec. 1986).

[19] The Commission reported that ongoing "driving under the influence" training for police had been instituted in all but one state—Utah. *Id.*

[20] *See* 23 U.S.C. §§ 402, 408 (1982). Under regulations promulgated at 23 C.F.R. § 1309.6(b) (1989), in order to qualify for supplemental grants pursuant to § 402 a state must "[h]ave in place and implement or adopt . . . eight of the following twenty-two requirements" including:

> (11) Use of roadside sobriety checks as part of a comprehensive alcohol safety enforcement program. To demonstrate compliance, a State shall submit information showing that it is systematically using roadside sobriety checks. In addition, a State shall provide a copy of its regulation or policy authorizing the use of roadside checks.

Id. at § 1309.6(b)(11).

[21] As an example, the sobriety checkpoint operations in Charlottesville, Virginia generally took place at night on Friday and Saturday. *See Voas, Rhodenizer & Lynn, supra* note 9, at 4. It

driving is more likely to occur.[22] Moreover, and contrary to the holding of the trial court, the deterrent effect of sobriety checkpoints is not necessarily temporary.[23] Recent studies indicate that the beneficial results deriving from programs utilizing sobriety checkpoints can in fact be very long lasting.[24]

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has been reported in a nationwide study conducted by the University of Michigan's Highway Research Institute that 3.2% of the drivers tested between 10:00 p.m. and midnight had blood alcohol contents at or above .10%, and 6.3% had levels between .05% and .09%. In the period between 2:00 and 3:00 a.m. 11.1% of the drivers tested at over .10% and 13.5% tested between .05% and .09%. *Jacobs & Strossen, supra* note 5, at 685 n.181.

[22] *See Ross, supra* note 9, reporting on the results of the United Kingdom's "Christmas Crusade".

[23] The trial court's discussion concerning the duration of any deterrent effect arising from the use of sobriety checkpoints is set forth in Pet. App. 92a-96a. Even where the results of sobriety checkpoints have been temporary, the Department of Transportation has recently noted as follows:

> Most of the observed reductions were temporary in nature, primarily because the enforcement efforts themselves were short-term. However, it would be improper to criticize enforcement programs for providing only temporary reductions when these programs have more frequently resulted in "bottomline" reductions in crashes than any other approach.

Alcohol Abuse Prevention Program for the Transportation Industry, *supra* note 9, at 46,335.

[24] *See, e.g., Levy, supra* note 9, at 255 (noting decreased traffic accidents involving drunk drivers in New Jersey dating from the institution of sobriety checkpoints in the early 1980s); *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving, supra* note 1, at 9 (noting that "New Jersey has reduced drunk driving deaths by 50% since 1981"); *Progress Report on Recommendations Proposed by the Presidential Commission on Drunk Driving, supra* note 18, at 8 (noting that in using an approach involving sobriety checkpoints and license suspension "[a]fter 10 years Minnesota has a fatality rate that is nearly 50% less than it was in 1976"); Shore & Maguin, *De-*

Finally, it must be emphasized that the benefits derived from the use of sobriety checkpoints far outweigh any inconveniences they cause the driving public. As noted by the Michigan trial court, "the average length of a stop when a person was confronted by a police officer at a checkpoint was approximately 30 seconds."[25] This minimal delay to motorists is consistent with delays experienced in other jurisdictions employing sobriety checkpoints.[26] While the Michigan courts and some commentators[27] have urged that such short delays are overly intrusive, motorists who have been subjected to sobriety checkpoints in fact consistently indicate that this is not the case and strongly support checkpoint programs.[28]

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terrence of Drinking-Driving: The Effect of Changes in the Kansas Driving Under the Influence Law, 11 Evaluation & Program Plan. 245, 245 (1988) (noting that in Kansas "[t]he longevity of the [deterrent] effect differs from prior experiences, in which initial declines were followed by relatively rapid returns to pre-intervention rates"); *cf. Homel, Carseldine & Kearns, supra* note 9, at 113 (noting that the 36% drop in alcohol-related fatalities following the institution of sobriety checkpoints in New South Wales, Australia, "has been sustained for more than four years.").

[25] Pet. App. 103a.

[26] *See, e.g., Voas, Rhodenizer & Lynn, supra* note 9, at 4 (indicating an average delay of significantly less than one minute at sobriety checkpoints in Charlottesville, Virginia).

[27] *See, e.g., Jacobs & Strossen, supra* note 5, at 650-54.

[28] *See* Note, *Clearing the Roadblocks to Sobriety Checkpoints*, 21 U. Mich. J.L. Ref. 489, 489 n.6 (1988), summarizing a study of 2,473 California drivers who had been subjected to sobriety checkpoints. 90.7% reported that the checkpoint did not significantly delay their journey and 87.1% indicated they approved of the use of sobriety checkpoints to detect and remove drunk drivers from the highway. *See also Voas, Rhodenizer & Lynn, supra* note 9; Lacey, *Enforcement and Public Information Strategies for DWI General Deterrence: ARREST DRUNK DRIVING—The Clearwater and Largo, Florida Experience*, U.S. Dep't of Transp. Final Report, DOT HS 807 066 (Dec. 1986).

Having said this, it can of course be conceded that a sobriety checkpoint causes a certain amount of anxiety in drivers. But a little bit of anxiety is not necessarily a bad thing. As the President's Commission has pointed out, one of the major tasks that must be accomplished if drunken drivers are to be removed from the highways is to change the public's perception of the "funny drunk."[29] Sobriety checkpoints send the clear message that drunken driving is no longer to be tolerated in this country. There is nothing "funny" about it. The process of reeducating the driving public to the fact that we will no longer countenance drunk drivers has been described as follows:

> Initially, compliance may be motivated by the *fear component* of the law. But if the inculcation process is effective, the *moral component* may supplant the fear component and, thereby, inhibit violations even when there is no chance of being caught. Still a further possibility is that the *habit component* may supercede [sic] so that the driver no longer considers the legal or moral issues, but complies more or less automatically.[30]

The *amici* urge that the value of sobriety checkpoints in fighting the war against drunk driving is clear. While strides are being made, the war is far from over. It would therefore be a sad mistake were the Court to agree with the Michigan courts and take away the sword just when the battle is joined. Sometimes individual victories in the war against drunken driving may seem hard to identify. But this should not be the case. They occur each and every time a child alights safely from a school bus.

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[29] *Final Report*, *supra* note 2, at 1.

[30] Snortum, *On Seeing the Forest and the Trees: The Need for Contextual Analysis in Evaluating Drunk Driving Policies*, 11 Evaluation & Program Plan. 279, 290 (1988) (emphasis in original).

II. SOBRIETY CHECKPOINTS ARE CONSTITUTIONAL

A. Sobriety Checkpoints Are Valid As Reasonable Conditions of Access to Public Highways

1. *Sobriety Checkpoints Are Closely Related to Highway Safety And Thus Should Be Evaluated Differently From General Law Enforcement Searches and Seizures*

Michigan's sobriety checkpoint program imposes certain requirements upon motorists for the protection of their own safety and the safety of other motorists and pedestrians. It requires motorists who enter a checkpoint to submit to a brief examination to determine whether they are in compliance with state law standards regarding drunk driving—standards established in recognition of the danger that drunk driving poses to highway users. The sobriety checkpoint program is, in short, a highway safety measure; it is imposed upon highway users to advance a permissible, and indeed essential, objective of the public highway program itself.

Despite the clear nexus between sobriety checkpoints and the use of publicly-owned highways, the court below evaluated the constitutionality of Michigan's sobriety checkpoint program under the standards that this Court has developed with respect to law enforcement searches and seizures in general, such as those undertaken to obtain evidence of violent crimes, thefts, or drug possession. The court below stated that the relevant standards were those set forth in this Court's cases involving enforcement of immigration laws, *see United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), or involving a suspicion of unspecified criminal activity by the defendant, *see Brown v. Texas*, 443 U.S. 47 (1979). *See Sitz v. Department of State Police*, Pet. App. 7a-11a. In those cases, however, there was no nexus between the purpose of the search and seizure at issue and the use of public facilities. The un-

differentiated use of those cases by the court below should be rejected.

This Court has repeatedly distinguished searches or seizures of motorists imposed as a legitimate condition of the use of public highways from general law-enforcement searches or seizures. In *United States v. Ortiz*, 422 U.S. 891 (1975), the Court held that searches of automobiles for illegal aliens, if performed at checkpoints removed from the border and its functional equivalents, were invalid under the Fourth Amendment unless supported by probable cause. The Court disclaimed any intention to require probable cause for all automobile searches, however. The Court noted, "It is quite possible, for example, that different considerations would apply to routine safety inspections *required as a condition of road use*." *Id.* at 897 n.3 (emphasis added). In *Brignoni-Ponce*, the Court again noted the potential significance of the connection between certain highway searches and seizures and the safety objectives of the highway program:

> Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local law enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters.

422 U.S. at 883 n.8.

The Court in *Martinez-Fuerte*, as in *Ortiz* and *Brignoni-Ponce*, took pains to distinguish the validity of brief stops for questioning "to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters." 428 U.S. at 560 n.14. While noting that the validity of such stops was not before it, the

Court pointed out that the practice "has a long history evidencing its utility and is accepted by motorists as incident to highway use." *Id.*

In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court held invalid a highway stop undertaken by a patrolling police officer to check the defendant's license and auto registration. The Court made clear, however, that its holding did not reach "spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion." *Id.* at 663. In a footnote, the Court added, "Nor does our holding today cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others." *Id.* at 663 n.26.

The Court's repeated suggestions as to the distinct status of automobile stops for enforcement of motor vehicle laws do not, of course, entail granting the states an open-ended power to place unrelated conditions on the use of highways. A motorist must be deemed to accept certain law enforcement measures that effectuate the purposes of the public highway program, but it does not follow that a motorist can be deemed to have granted the state, as a condition of using the highways, an unlimited power to stop his or her automobile at any time without suspicion and conduct a search for contraband.[21] Rather, the Court's statements as to automobile stops in *Ortiz*, *Brignoni-Ponce*, *Martinez-Fuerte*, and *Prouse* simply recognize that the reasonableness of automobile searches or seizures undertaken to further the objectives of the pub-

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[21] If, however, evidence of other criminal activity is in plain view at a checkpoint established for enforcement of laws regarding driver's licenses, sobriety, or other motor vehicle matters, then that evidence may be seized there, just as evidence in plain view may be seized in other situations. *See Arizona v. Hicks*, 480 U.S. 321 (1987); *Texas v. Brown*, 460 U.S. 730 (1983); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

lic highway program must be evaluated on a different basis from those undertaken for other law enforcement purposes. Certain law enforcement measures are part of the general system of highway safety enforcement that a state can legitimately impose upon motorists on the basis of implied consent.[32] In contrast, the immigration laws that the Border Patrol sought to enforce with automobile stops in *Ortiz*, *Brignoni-Ponce*, and *Martinez-Fuerte* did not bear any such relation to the highway program.

2. *Sobriety Checkpoints Are Analogous to Administrative Searches That Have Been Held to Comply With The Fourth Amendment*

The distinctive relationship of sobriety checkpoints to safety supports their validity under the Fourth Amendment as reasonable conditions of access to the publicly-owned highway system. Because they are not undertaken for general law enforcement purposes unrelated to highway safety, it is unnecessary to characterize such searches as "administrative" rather than "criminal" in order to sustain them. However, the administrative search doc-

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[32] The same rationale holds in the context of airline travel, where passengers are screened for weapons prior to flight, whether a reasonable suspicion exists or not. *See National Treasury Employees Union v. Von Raab*, —— U.S. ——, —— n.3, 109 S. Ct. 1384, 1395 n.3 (1989). The validity of the screening procedure seems clear not only when considered under the balancing test applied to general law enforcement searches, but also when considered as a safety-related condition upon the use of airports. A number of federal and state appellate decisions have upheld such searches on the basis of implied consent. *See, e.g., United States v. Haynie*, 637 F.2d 227, 230 (4th Cir. 1980), *cert. denied sub nom. Fletcher v. United States*, 451 U.S. 972 (1981); *United States v. Pulido-Baquerizo*, 800 F.2d 899 (9th Cir. 1986); *United States v. Henry*, 615 F.2d 1223, 1228 (9th Cir. 1980); *United States v. Herzbrun*, 723 F.2d 773, 776 (11th Cir. 1984); *Shapiro v. State*, 390 So.2d 344, 347 (Fla. 1980), *cert. denied*, 450 U.S. 982 (1981). *Cf. McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978) (implied consent to search prior to entering courthouse).

trine provides an additional rationale for the validity of sobriety checkpoints.

The Court in *Delaware v. Prouse* drew a distinction between automobiles and certain highly-regulated industries for purposes of discretionary administrative searches, holding that automobile inspections unaccompanied by individualized suspicion "must be undertaken pursuant to previously specified 'neutral criteria.'" 440 U.S. at 662, citing *Marshall v. Barlow's Inc.*, 436 U.S. 307, 323 (1978).

Subsequently, the Court elaborated the administrative search doctrine in *New York v. Burger*, 428 U.S. 691 (1987), in terms fully applicable to the present situation. Use of the highways, of course, has for many years been highly regulated. *See id.* at 703-07. The Court has recognized the diminished expectations of privacy that attend the operation of automobiles on public highways.[33]

Roadside sobriety checkpoints satisfy the three criteria set forth in *Burger* for making warrantless regulatory inspections valid under the Fourth Amendment. 482 U.S. at 708-12. First, as noted above, the state has an interest in preventing the loss of life caused by drunk driving, which is certainly a weightier interest than the problem of automobile theft addressed by the regulatory scheme in *Burger*. Second, the requirement of a warrant or individualized suspicion would interfere with the deterrent impact that sobriety checkpoints are designed to achieve. Third, the characteristics of a sobriety checkpoint program provide a constitutionally adequate substitute for a warrant by placing appropriate constraints upon police discretion. *See also Donovan v. Dewey*, 452 U.S. 594, 603, 605 (1981).

Finally, as the Court pointed out in *Burger*, the facts that drunk driving is a criminal offense and that check-

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[33] *See, e.g., Arkansas v. Sanders*, 442 U.S. 753, 761 (1979); *South Dakota v. Opperman*, 428 U.S. 364, 368 (1978).

points are operated by police officers do not preclude applicability of the administrative search doctrine. 482 U.S. at 712-18.

The California Supreme Court, in *Ingersoll v. Palmer*, 241 Cal. Rptr. 42, 43 Cal. 3d 1321, 743 P.2d 1299 (1987), relied upon the administrative search doctrine in upholding a sobriety checkpoint on the basis that it "was operated not for the primary purpose of discovering or preserving evidence of crime or arresting lawbreakers, but primarily for the regulatory purpose of keeping intoxicated drivers off the highways to the end of enhancing public safety." 743 P.2d at 1309. As indicated above, we do not believe this characterization is essential for upholding the validity of sobriety checkpoints under the Fourth Amendment, but it provides an additional rationale that is fully consistent with this Court's decisions.

3. *Sobriety Checkpoints Are Reasonable Because They Do Not Involve The Unconstrained Exercise of Discretion*

Whatever the additional limitations that may govern automobile stops for general law enforcement purposes, sobriety checkpoints should be judged under the standard suggested by the opinion of the Court and the concurrence in *Prouse* regarding license checkpoints. *See Prouse*, 440 U.S. at 663; *id.* at 664 (Blackmun, J., concurring).[34] Although the Court in *Prouse* suppressed evidence from a license check done by a patrolling police officer without reasonable suspicion, the Court stated that it was allowable to perform "spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion." *Id.* at 663. The Court noted, "Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* Justice Blackmun observed that the Court's objective of controlling police intrusion and discretion would also be satisfied by "other not purely random stops (such as every tenth car to pass a given point) that equate with, but are less intrusive than, a 100% roadblock stop." *Id.* at 664.

[34] In *Texas v. Brown*, *supra*, four members of the Court stated that a stop at a license checkpoint was valid, citing *Prouse*. *See Texas v. Brown*, 460 U.S. at 739 (Rehnquist, J.) (plurality opinion). The concurring Justices did not indicate whether the initial stop at the license checkpoint in that case was valid. *See id.* at 746 (Powell, J., concurring); *id.* at 747 (Stevens, J., concurring).

The checkpoint standard suggested in *Prouse*, by limiting or eliminating the subjective discretion of the police as to which vehicles will be stopped, amply protects motorists from pretextual stops made for arbitrary or invidious reasons. The Michigan checkpoint program meets this standard. Under the procedures established for the program, all motorists were to be stopped upon reaching a checkpoint. *Sitz*, Pet. App. 5a; *Michigan State Police Sobriety Checkpoint Guidelines* § VII(E) (1986), Pet. App. 154a.

Following a brief initial contact with the motorist, the officers at the checkpoint were to send the motorist on his or her way or to detain the motorist for testing. *Id.* The decision to detain a motorist, although dependent on the officers' professional judgment, was to be made in accordance with standards that would satisfy the reasonable suspicion requirement for an investigative detention, *see Terry v. Ohio*, 392 U.S. 1 (1968), or the probable cause requirement for an arrest. The trial court found that the decision to detain a motorist further, after a brief initial contact, was made in accordance with "those standards commonly used by police to stop vehicles in order to investigate for possible drunk driving." Wayne County Circuit Court Opinion in *Sitz v. Michigan Dep't of State Police*, No. 86-613-063-C2 (Wayne County 3d Jud. Cir. July 26, 1986), Pet. App. 111a-112a. In particular, the procedures directed that the officers were to "be alert for articulable indications of intoxication," such as "an odor of intoxicants about the driver, slurred speech, lack of

physical coordination, unusual eye movements, disorientation, or other behavior commonly associated with OUIL or OUID." *Michigan State Police Sobriety Checkpoint Guidelines, supra*, § VII(E), Pet. App. 155a. Only those drivers exhibiting signs of intoxication were to be detained beyond the initial contact.

In summary, a checkpoint program such as Michigan's sobriety checkpoint program, operated to enforce highway safety standards or other motor vehicle laws, should be upheld as a reasonable search and seizure where the decision to stop a vehicle is determined by nondiscretionary criteria, as suggested in *Prouse*, and where any further detention is made in accordance with the applicable requirements for investigatory detentions or arrests.

B. Sobriety Checkpoints Are Also Valid Under This Court's Fourth Amendment Balancing Test As Applied To Checkpoints For General Law Enforcement

1. *Sobriety Checkpoints Are Minimally Intrusive And Are Supported By A Weighty Public Interest*

As set forth in Part II-A, the court below erred in reviewing the sobriety checkpoint program on the same basis as searches and seizures for general law enforcement purposes unrelated to highway laws. Even under the balancing test that the court applied, however, Michigan's program should be upheld. In the view of the court below, the controlling standard was that described in *Brown v. Texas, supra*, concerning seizures that are less intrusive than a traditional arrest: "'Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure serves the public interest, and the severity of the interference with individual liberty.'" *Sitz*, Pet. App. 11a (quoting *Brown v. Texas*, 443 U.S. at 50-51).

The public concerns served by sobriety checkpoints are of the highest importance. The court below noted that the evidence in the trial record indicated that alcohol use contributed to between twenty-five and fifty percent of motor vehicle fatalities. *Sitz*, Pet. App. 13a. In fact, the President's Commission on Drunk Driving concluded that alcohol use contributed to *at least* fifty percent of motor vehicle fatalities.[35] As discussed in Part I of this submission, few public concerns are weightier than preventing the loss of thousands of lives each year from drunk driving.

It is equally clear that sobriety checkpoints pose only the most minimal interference with the liberty of the motorist. The vast majority of motorists will pass through the checkpoint without having to leave their cars and without any appreciable delay. The court below noted that at the first operation of a checkpoint under Michigan's program, the average delay to motorists was twenty-five seconds or less. Of the 126 vehicles that passed through the checkpoint, only two drivers were detained for further sobriety testing, of whom one was arrested.[36] *Sitz*, Pet. App. 6a.

Despite the seemingly lopsided balance between the significant public interest in prevention of drunk driving and the negligible burden of passing through the checkpoint, the court below managed to find the checkpoint program invalid. It did so on two grounds: first, that sobriety checkpoints were either not an effective means of controlling drunk driving or not the most effective means, *id.* at 14a-20a, and second, that sobriety checkpoints had the potential "to generate fear and surprise to motorists," *id.* at 20a-22a. As the following sections will discuss, both of these holdings were erroneous.

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[35] *See* page 3 *supra*.

[36] A third driver went through the checkpoint without stopping and was arrested for drunk driving.

2. *The Validity Of Sobriety Checkpoints Does Not Hinge Upon Whether They Can Be Shown To Be The Least Intrusive Or Most Effective Means Of Drunk Driving Control*

The court below held that sobriety checkpoints were ineffective in that they produced a low number of arrests; it noted expert testimony that "one percent or fewer of the drivers passing through sobriety checkpoints are arrested for drunk driving" and that any deterrent effect would continue only temporarily. *Id.* at 15a. (The court gave no reason for regarding one percent as an insufficient proportion of arrestees or for regarding a short-term deterrent effect as inadequate to justify the program.) The court also found that other, more effective means of combatting drunk driving were available.

The court's views were erroneous as a matter of fact and irrelevant as a matter of Fourth Amendment law.[37] As a factual matter, sobriety checkpoints serve to deter potential drunk drivers who would not be deterred by other, less visible, means of enforcement.[38] They also enable the police to detect drunk drivers who have enough control to avoid obviously erratic movements but who may

[37] Some other state courts have looked to the existence of less intrusive or more efficient means in striking down a sobriety checkpoint. *See, e.g., State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (Idaho 1988); *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983); *State v. Leighton*, 551 A.2d 116 (Me. 1988); *State v. Muzik*, 379 N.W.2d 599 (Minn. Ct. App. 1985); *State v. Koppel*, 127 N.H. 286, 499 A.2d 977 (1985); *Seattle v. Mesiani*, 110 Wash. 2d 454, 755 P.2d 775 (1988). A number of state courts, however, have expressly rejected the argument that a sobriety checkpoint must be supported by a showing as to the absence of less intrusive or more efficient means. *See, e.g., People v. Bartley*, 93 Ill. Dec. 347, 109 Ill. 2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 476 U.S. 1068 (1986); *State v. Garcia*, 500 N.E.2d 158 (Ind. 1986), *cert. denied*, 481 U.S. 1014 (1987); *Commonwealth v. Shields*, 402 Mass. 162, 521 N.E.2d 987 (1988); *State v. Welch*, 755 S.W.2d 624 (Mo. Ct. App. 1988).

[38] *See* page 10 *supra*.

not be able to respond adequately in a sudden emergency.[39] As a matter of law, the court erred in assuming that sobriety checkpoints must satisfy some threshold level of effectiveness or that they must be the least intrusive or most effective means available. This Court has rejected the view that the Fourth Amendment imposes such requirements. "'[T]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.'" *Skinner v. Railway Labor Executives' Ass'n*, —— U.S. ——, —— n.9, 109 S. Ct. 1402, 1419 n.9 (1989) (quoting *Martinez-Fuerte*, 428 U.S. at 556-57 n.12). *See also National Treasury Employees Union*, —— U.S. at —— & n.3, 109 S. Ct. at 1395 & n.3; *United States v. Villamonte-Marquez*, 462 U.S. 579, 591 n.5 (1983); *Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973). *But see Prouse*, 440 U.S. at 659.

3. *The "Fear And Surprise" Standard Applied By The Court Below Is Without A Factual Basis*

The Court below affirmed the trial court's finding that although the "objective intrusion" by the checkpoints was "minimal," the checkpoints nonetheless infringed the Fourth Amendment because they could produce "subjective intrusion" in the form of "fear or surprise" to motorists. *Sitz*, Pet. App. 21a. Among the features of the checkpoints that the trial court found to contribute to fear and surprise was that the public would not necessarily receive advance notice of the existence of a checkpoint, because although the police planned to inform the news media as to the county in which a checkpoint would be located, "the defendants have not indicated that the news media are required to publish this information or to give the checkpoint any special attention." Wayne County Circuit Court Opinion, Pet. App. 108a. Also, the

[39] *See* page 9 n.13 *supra*.

trial court noted, "there is no dispute that at least the publicly stated purpose of checkpoints . . . is to search for violators of criminal law. Thus, the potential for checkpoints in generating fear in motorists as they pass through is heightened." *Id.* at 110a.

The "finding" of the trial court regarding fear and surprise was entirely speculative. The reliance of the court below and some other state courts[40] upon fear and surprise as a basis for invalidating sobriety checkpoints stems from statements of this court in *Martinez-Fuerte*, 428 U.S. at 558, and *Ortiz*, 422 U.S. at 894-95. In those cases, the Court distinguished checkpoint stops and stops by roving patrol cars partly on the ground that being stopped at a fixed checkpoint rather than by a roving patrol car would inspire less concern on the part of the motorist. This Court should now make clear that checkpoint stops differ constitutionally from random stops by patrol cars because checkpoint stops involve less police discretion, not because they putatively inspire less fear or surprise.

In deciding the validity of a search or seizure, consideration of subjective factors may sometimes be appropriate, but courts should not make speculative forays into armchair psychology in doing so. Absent any firm basis for determining that a search or seizure will generate undue "fear or surprise," invalidating a search or seizure on that ground is undesirable for two reasons. First, such a conclusion is essentially arbitrary. For example, although this Court found in *Martinez-Fuerte* and *Ortiz* that a sizable police presence, with highly visible indicia of official authority, serves to reduce fear and surprise, respondents in this case argue that a sizable police presence serves to *stimulate* fear and surprise. *See* Brief In

[40] Other state court decisions that have looked to "fear and surprise" in striking down sobriety checkpoints include *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984); *Webb v. State*, 739 S.W.2d 802 (Tex. Crim. App. 1987).

Opposition To Petition For Writ Of Certiorari, at 29. The point is not that respondents are incorrect in this assertion, but rather that there is no basis in the record to support *either* position. Second, reliance on certain aspects of a search and seizure as engendering fear or surprise will leave courts in the future with virtually unconstrained discretion to uphold or invalidate a police activity under slightly different facts and, correspondingly, will provide localities with little guidance as to what police activities are permissible or impermissible. Searches or seizures that are as fleeting and limited as the checkpoint at issue here clearly do not justify the lower court's reliance on "fear or surprise" as a ground for invalidation.

C. The Fourth Amendment Does Not Authorize The Judiciary to Engage in Detailed Oversight of Public Policymaking As To Sobriety Checkpoints

Many state courts reviewing sobriety checkpoints have looked to factors bearing no relation to the intrusiveness of the checkpoint, such as the rationality of a checkpoint location,[41] the level of the police command structure at which the location was chosen,[42] or the provision of advance publicity as to the existence of the checkpoint on a particular date.[43] The Supreme Court of Kansas, in *Deskins*, listed these and other factors as part of a balancing inquiry:

> Numerous conditions and factors must be considered in determining whether a DUI roadblock meets the

[41] *See, e.g., State v. Muzik*, 379 N.W.2d 599, 603 (Minn. Ct. App. 1985); *State v. Egan*, 213 N.J. Super. 133, 516 A.2d 1115 (N.J. Super. Ct. App. Div. 1986) (state constitution).

[42] *See, e.g., State v. Golden*, 171 Ga. App. 27, 318 S.E.2d 693 (Ga. Ct. App. 1984); *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976).

[43] *See, e.g., State v. Deskins*, 234 Kan. 329, 673 P.2d 1174, 1185 (1983).

balancing test in favor of the state. Among the factors which should be considered are: (1) The degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test.[44]

Some of these factors may be worthwhile measures for a police department to consider as a matter of policy. They are not properly matters for judicial oversight, however. Open-ended, highly fact-specific decisions such as the one quoted above must lead to perpetual relitigation of the issue. No thirteen-factor balancing test can possibly provide a stable or predictable jurisprudence. *Cf. Solorio v. United States*, —— U.S. ——, ——, 107 S. Ct. 2924, 2931-32 (1987). As with reliance on the subjective factors of "fear or surprise," utilization of these essentially policy-based factors will leave reviewing courts with unconstrained discretion in distinguishing future checkpoints and will leave localities without guidance.

More important, the Fourth Amendment simply does not charge the judiciary with reviewing the location of a checkpoint, the time and duration of a checkpoint, or other matters ordinarily within the province of local authorities. For example, absent an independent basis for reviewing a choice of checkpoint location—*e.g.*, that it was chosen for racially discriminatory purposes—that

[44] *Id.*

choice is within the plenary discretion of the police. The Fourth Amendment provides no basis for courts to engage in close management of police operations except to the extent that police conduct violates "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

CONCLUSION

For the foregoing reasons, the judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

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State Appellate Decisions
Regarding Constitutionality of
Sobriety Checkpoints

A. *Decisions Upholding Sobriety Checkpoints*

Arizona: *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984).

Arkansas: *Coffman v. State*, 26 Ark. App. 45, 759 S.W.2d 573 (1988).

California: *Ingersoll v. Palmer*, 241 Cal. Rptr. 42, 43 Cal. 3d 1321, 743 P.2d 1299 (1987).

Georgia: *State v. Golden*, 171 Ga. App. 27, 318 S.E.2d 693 (1984).

Illinois: *People v. Bartley*, 93 Ill. Dec. 347, 109 Ill. 2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 467 U.S. 108 (1986).

Indiana: *State v. Garcia*, 500 N.E.2d 158 (Ind. 1986), *cert. denied*, 481 U.S. 1014 (1987).

Iowa: *State v. Riley*, 377 N.W.2d 242 (Iowa Ct. App. 1985).

Kansas: *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983).

Kentucky: *Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky. Ct. App. 1983), *cert. denied*, 465 U.S. 1105 (1984).

Maine: *State v. Leighton*, 551 A.2d 116 (Me. 1988).

Maryland: *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984).

Massachusetts: *Commonwealth v. Shields*, 402 Mass. 162, 521 N.E.2d 987 (Mass. 1988); *Commonwealth v. Trumble*, 396 Mass. 81, 483 N.E.2d 1102 (1985).

Missouri: *State v. Welch*, 755 S.W.2d 624 (Mo. Ct. App. 1988).

New Hampshire: *Opinion of the Justices*, 128 N.H. 14, 509 A.2d 744 (1986).

New Mexico: *City of Las Cruces v. Betancourt*, 105 N.M. 655, 735 P.2d 1161 (N.M. Ct. App. 1987).

New York: *People v. Scott*, 63 N.Y.2d 518, 483 N.Y.S.2d 649, 473 N.E.2d 1 (1984).

Oregon: *Nelson v. Lane County*, 304 Or. 97, 743 P.2d 692 (1987).

Pennsylvania: *Commonwealth v. Tarbert*, 535 A.2d 1035 (Pa. 1985).

Vermont: *State v. Record*, 548 A.2d 422 (Vt. 1988); *State v. Martin*, 496 A.2d 442 (Vt. 1985).

Virginia: *Lowe v. Commonwealth*, 337 S.E.2d 273 (Va. 1985), *cert. denied*, 475 U.S. 1084 (1986).

B. *Decisions Invalidating Sobriety Checkpoints*

Florida: *State v. Jones*, 483 So. 2d 433 (Fla. 1986).

Idaho: *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (Idaho 1988).

Louisiana: *State v. Church*, 538 So. 2d 993 (La. 1989).

Michigan: *Sitz v. State Police*, 170 Mich. App. 433, 429 N.W.2d 180 (1988), *application for leave to appeal denied*, 432 Mich. 872 (Mich. 1989).

Minnesota: *State v. Muzik*, 379 N.W.2d 599 (Minn. Ct. App. 1985).

Nebraska: *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986).

New Hampshire: *State v. Koppel*, 127 N.H. 286, 499 A.2d 977 (1985).

New Jersey: *State v. Egan*, 213 N.J. Super. 133, 516 A.2d 1115 (N.J. Super. Ct. App. Div. 1986).

Oklahoma: *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984).

Rhode Island: *Pimental v. Department of Transportation*, 561 A.2d 1348 (R.I. 1989).

South Dakota: *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976).

Texas: *Webb v. State*, 739 S.W.2d 802 (Tex. Crim. App. 1987).

Washington: *Seattle v. Mesiani*, 110 Wash. 2d 454, 755 P.2d 775 (1988).